IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 38 OF 2001

Shri Danzil Oscar S. Dias,
son of Diogo A.S. Dias, major of age,
married, resident of Varsha Niwas,
New Waddem, Vasco de Gama, 403 802. ..... Appellant.

V/s.

1. Shri Jose J. Coutinho,
major of age, businessman, owner of
the Mini Bus No.GDS 2458, resident of
1st Daddio Telaulim, Navelim, Salcete, Goa.

2. Shri Mohamad Shafi, son of Mohamad Isac,
major of age, Driver, resident of House No.
106, Pedem, Khareband, Margao,
Salcete, Goa;

3. The New India Assurance Company Ltd.,
Jagonath Bldg., Jose Inacio De Loyola Road,
Near Railway Gate, Margao,
Salcete, Goa. ..... Respondents.

Mr. M.P. Almeida, Advocate for the appellant.

Mr. E. Afonso, Advocate for respondent No.3.

CORAM : P.V. HARDAS &
D.G. KARNIK, JJ.

DATE OF RESERVIING THE JUDGMENT :
MARCH 18, 2004.

DATE OF PRONOUNCING THE JUDGMENT :
MARCH 23, 2004.

J U D G M E N T : (Per KARNIK, J.)

1. By this appeal, the appellant claims enhancement in the compensation

awarded to him in a Motor Accident Claim Petition No. 109/1993.

2. On October 17, 1992, the appellant was travelling on a motor cycle bearing registration No.GA-02-5867 from Vasco-da-Gama to Margao via Cortalim. While the motor cycle was ascending the slope, a mini bus bearing registration No.GDA 2458 came in the opposite direction at a very fast speed, came to the right hand side of the road and gave a dash to the appellant. The appellant was overthrown along with the pillion rider, off his motor cycle and sustained grievous injuries including fracture of three ribs and multiple fractures of upper right tibia fibula (shin-bone). The appellant had to undergo bone grafting surgery on his right leg for upper tibia fibula by removing the bone from his pelvic region. The appellant suffered permanent disability of the right knee and lost his job. The appellant, therefore, claimed compensation of Rs.12,56,904.19 under different heads. The mini bus owned by respondent No.2 and was being driven by respondent No.1 at the relevant time and was insured with respondent No.3 Insurance Company. Despite service, respondents No.1 and 2 remained absent before the Motor Accident Claims Tribunal and they are also absent in this Court. The Motor Accident Claims Tribunal (for short `the Tribunal') has come to the conclusion that the mini bus was being driven by the respondent No.1 in a fast and negligent manner. The Tribunal has also noted that the brake marks on the road showed that the mini bus first went to the left, then to the right side of the road and dashed against the appellant's motor cycle. The mini bus was driven at so high a speed that ultimately it fell on its left side. The Tribunal awarded total compensation of Rs.1,54,000/- to the appellant for loss of salary during the period of

hospitalisation, reimbursement of medical expenses and the expenses of the attendants and masseur and compensation for pain and suffering as also for loss of salary of claimant's wife for short period during which she was required to attend to the appellant during his illness in the hospital. The Tribunal did not allow any claim for future loss of income. No cross appeal nor cross objections have been filed by the respondents challenging the findings of the Tribunal on negligence or the amount of compensation awarded.

3. In the present appeal, the appellant claims compensation for loss of his future earnings. At the time of the accident, the appellant was 51 years' of age and was employed in a small private concern, on a monthly salary of Rs.4800/- . The job of the appellant involved travelling and even at the time of the accident, the appellant was travelling on his motor cycle pursuant to his employment and had gone to Salgaonkar Workshop at Cortalim. On account of the injuries suffered in the accident, the appellant could not go to work for a period of 11 months. Thereafter, his previous employer Purohit Minerals Pvt. Ltd., engaged him again, but on retainership basis, instead of regular employment. He worked for some time, but due to the injuries suffered by him in the accident he was unable to undertake physical strain and unable to continue with the work. Therefore, by a letter dated January 7, 1995, the appellant tendered his resignation. It is not clear whether the resignation was voluntary or whether the appellant was required to give his resignation at the behest of the employer or as the appellant was unable to cope up with the work. The fact, however, remains that the appellant could not continue with the work on account of the

injuries suffered due to the accident. The fact of appellant resigning on account of inability to undertake physical strain of employment was not challenged before the Tribunal.

4. At the time of the accident, he was employed as a Senior Welfare Officer, drawing a salary of Rs.4800/- per month. The appellant claimed that by the time of retirement, he would have been promoted and would have easily drawn a salary of Rs.10,000/- per month, the employment was a private employment and there was no fixed age of retirement and people in the Company often work unto the age of 65 years. On account of the accident, the appellant was unable to work and, therefore, was unable to earn the salary upto the normal age of 65 years. He should, therefore, be paid compensation for loss of salary. The appellant examined CW.4 Raghuvir Ambe, a representative of his past employer, who stated that the Dy. Personnel Manager was the highest post in the Personnel Department carrying a salary of Rs.6,000/- per month and normal retirement age in the Company was 58 years. The appellant's claim of loss of salary can be considered only on the basis of existing salary of Rs.4800/- per month and the retirement age of 58 years. The learned Member of the Tribunal, however, declined to grant any amount whatsoever to the appellant for future loss of salary. The learned Member held that as per the Medical Certificate the permanent disability was to the extent of 15 % only. The learned Member also relied upon the Judgment rendered in the case of ***A.S. Sharma vs. Union of India and another,*** 1995 ACJ 493 wherein it was held that physical impairment does not necessarily correlate or go coextensive with that of percentage of earning capacity. The learned Member

held that with the 15 % disability, it was not proved that there was any diminishing in the earning capacity and, therefore, the appellant was not entitled to any claim by way of future loss of income.

5. The claimant examined the treating doctor, Mr. Barreto, as a witness - CW.5. The doctor stated that the appellant was admitted in surgical ward of the Goa Medical College Hospital and he was transferred to the Orthopedic Ward on 30.10.1992. An operation was performed on the appellant for open reduction and internal fixation of the fracture on 6.11.1992 and the appellant was in the Ward upto 13.1.1993. Even after the operation, the appellant had permanent restrictions of knee joint motion. The doctor assessed the said restrictions as a permanent disability to the extent of 15 %. The doctor further stated that the tibia of the appellant had collapsed during the treatment and on that count the appellant would suffer from premature arthritis. The doctor, however, did not assess the permanent disability due to the premature arthritis.

6. We agree with the observations made in the case of ***S. Sharma vs. Union of India and another,*** (supra) that the loss of earning capacity would not necessarily be coextensive with the permanent physical disability. Such loss of earning capacity may be less or more than the percentage of disability. For example loss of vision of one eye results in permanent disability of only 30 % (see Workmen's Compensation Act, Schedule I, Part II, Entry No.25), but that may make a person to drive a motor vehicle and would result in a complete loss of earning capacity of a person employed as a driver unless it is shown that he could undertake some other avocation.

Similarly, a person who is working in a forge shop and he is required to operate hammer by hand may lose his entire earning capacity on account of loss of his one hand even though the disability may be only 60 % as per entry No.4 of Part II of the Schedule to the Workmen's Compensation Act. Learned Member of the Tribunal was, therefore, not right in holding that mere 15 % disability would not result in any loss of income for the appellant. It is not disputed that the appellant lost his job - whether by resignation or otherwise in January, 1995 on account of he being unable to undertake physical strain and continue to work for his employer. The employer was kind enough initially to appoint the appellant as retainer after the accident, but did not continue with the assignment. In the normal circumstances, the appellant would have continued to work upto the age of 58 years. At the time of the accident, the appellant was only 51 years' of age and at the time of his resignation, he was about 54 years' of age. Thus the appellant lost the job about 4 years prematurely on account of the accident. We are, therefore, of the opinion that the learned Member of the Tribunal was not right in totally discarding the claim of the appellant in respect of his loss of future earning on account of the accident.

7. The next question that we have to consider is what would be the appropriate compensation for loss of future earnings. In the present case, it is proved that the appellant completely lost his job on account of the accident four years prematurely. No material was placed before the Tribunal to show that the appellant was employed anywhere else thereafter. The representative of the employer CW.4 has stated that the appellant possessed no special skill as a Welfare Officer, but was employed as he

served the purpose of the employer. Considering the fact that the appellant had no special skills and was aged around 54 years on the date of his discharge and considering the fact that no evidence has been adduced that the appellant was employed anywhere else thereafter, we are of the opinion that the appellant was unable to secure any other employment. Thus loss of salary for four years was entirely on account of permanent disability arising out of the accident. Such loss cannot be quantified at 15 % of his earning potential on the basis that the disability was only 15 %. Of course, a suitable deduction would be required to be made for the purpose of uncertainties of the life as also taking into consideration that the permanent disability was not total and was partial. The yearly salary of the appellant at the time of the accident was Rs.57,600/- (Rs.4800x12). Applying the multiplier of 4 years, the loss of salary for 4 years would come to Rs.2,20,400/- upto the age of 58 years. Taking into consideration the uncertainties of life and also taking into consideration the fact that the disability was partial, though it resulted in total loss of employment, and taking into consideration the age of the appellant, his qualifications, we consider it appropriate to deduct 50 % and award 50 % of this amount as compensation towards loss of salary, which would come to Rs.1,10,200/- . We are conscious that there is some ad-hocism in choosing 50 % as figure for deduction but that is inevitable and we consider it to be fair in the facts and circumstances, and as such should not be considered as precedence, but would depend upon the facts and circumstances of each case. We, however, of the firm view that we cannot apply the figure of 15 % as suggested by the learned Counsel for the respondent on the basis that the disability of the appellant was only to the extent of 15 % . As stated earlier,

the loss of earning would not necessarily be proportionate to the per centage of disability.

8. In the circumstances, the appeal is partly allowed. In addition to the amount already awarded to the appellant, the appellant shall be entitled to a sum of Rs.1,10,200/- together with interest thereon at the rate of 9 % per annum from the date of accident i.e. 17.10.1992 up to the date of payment for loss of future earnings. The respondent No.3 shall pay proportionate costs of the appeal.

P.V. HARDAS, J.

D.G. KARNIK , J.

ssm.